2-5-83

12258

United States

Court of Appeals

For the Ninth Circuit.

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

Transcript of Record

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court Southern District of California, Central Division

Civil Action No. 8977-Y

B. H. STAUFFER and
STAUFFER SYSTEM, INC.,

Plaintiffffs,

vs.

KATHLEEN EXLEY,

Defendant.

COMPLAINT FOR UNFAIR COMPETITION

Plaintiffs Complain of Defendant and Allege:

I.

Plaintiff B. H. Stauffer is a citizen of the State of California, residing in Los Angeles County, California; plaintiff Stauffer System, Inc. is a corporation organized and existing under the laws of the State of California, with its principal place of business at Los Angeles, California.

II.

Upon information and belief, defendant Kathleen Exley is a citizen of the State of California, residing in Los Angeles County, California. [2*]

III.

Jurisdiction is founded on the existence of a question arising under the Statutes of the United States of America and, more particularly, this action arises

* Page numbering appearing at bottom of page of original certified Transcript of Record.

under the Act of July 5, 1946, C. 540, United States Code Annotated, Title 15, Sections 1051 to 1127, inclusive.

IV.

Plaintiff B. H. Stauffer in the year 1932 commenced to research and develop a method of therapeutic treatment, referred to hereinafter as the "Stauffer System," which system is based on the giving of passive exercise through the use of special apparatus, such treatment and said apparatus being designed, originated and developed by B. H. Stauffer, such treatments being sometimes referred to hereinafter as "Stauffer" treatments. Plaintiff B. H. Stauffer continued such research and development work from the year 1932 until the year 1937, expending thereon a substantial portion of his time and substantial amounts of money throughout said period in perfecting and adapting the "Stauffer System" to the needs of the public.

V.

Plaintiff B. H. Stauffer by an agreement effective July 1, 1947 granted to plaintiff Stauffer System, Inc. certain rights which plaintiff, Stauffer System, Inc., now owns and exercises, which said certain rights include the right to use the Stauffer System method of treatments and the right to use the trademark "Stauffer System."

VI.

In the year 1938, B. H. Stauffer commenced to render [3] to the public of the State of California

"Stauffer" treatments under the name of "Stauffer System," and such treatments have continuously since that time been so rendered to said public by B. H. Stauffer or Stauffer System, Inc., or by persons acting under their direction, supervision, and control as to the nature and quality of the "Stauffer" treatments; in the year 1938, B. H. Stauffer personally opened a place of business at Los Angeles, California, for the purpose of so rendering said treatments. In the latter part of the year 1941, B. H. Stauffer personally opened a further such place of business at Beverly Hills, California, which place of business was operated continuously since its opening by so rendering said "Stauffer" treatments to many members of the public, such place of business having been owned and personally so operated by B. H. Stauffer until the year 1943, at which time he closed the same; many further such places of business have been opened and so operated by others with the express permission and consent of B. H. Stauffer or Stauffer System, Inc., and under license from B. H. Stauffer or Stauffer System, Inc., and subject to their direction, supervision, and control as to the nature and quality of the treatments rendered to the public thereby and prior to and since the acts of defendant complained of herein.

All of such further places of business from their inception have at all times been owned by others than plaintiffs, but the owners thereof have at all times recognized and acquiesced in plaintiffs' exclusive right to use of the name "Stauffer" and

"Stauffer System" in connection with the rendering of such "Stauffer System" treatments to the public, and have recognized and acquiesced in plaintiffs' right to control, supervise, and direct the nature and quality of such treatments rendered by them. Plaintiffs have spent large sums of money and a substantial portion of their time in educating and training the operators of said places of business in the rendering of the "Stauffer System" treatments to the public, and spent large sums of money and a substantial portion of their [4] time in supervising and directing the rendering of such treatments to the public by said places of business.

VII.

All of said "Stauffer System" treatments rendered to the public under plaintiffs' direction, supervision, and control, and said places of business rendering the same, as alleged in Paragraph V hereof, have been extensively advertised and otherwise extensively publicized in the State of California and throughout the United States as "Stauffer Salons" under the name and style of the "Stauffer System" by plaintiffs and by the persons owning and operating said places of business under plaintiffs' direction, supervision, and control, all of whom have expended large sums of money on such advertising and publicity, all prior to and since May 27, 1946. Such advertising and publicity have consisted, in part, of advertising in newspapers having circulation in this District and outside of this District, of

radio programs and commercials adapted to be heard by the public in California and throughout the United States, and in magazines having national circulation.

VIII.

By reason of the acts of plaintiffs and those persons acting under their direction, supervision, and control, as aforedescribed, plaintiffs, prior to the commencement of defendant's acts complained of herein, built up and developed an extensive business throughout this District and elsewhere in the United States in the rendering to the public such "Stauffer" treatments, under the trade name and style of the "Stauffer System," by which trade name they are now known to the public in this District and throughout the United States, [5] and by which designations the public has long identified such treatments as being under plaintiffs' direction, supervision, and control, and by which designations such public has come to identify such treatments and said designations with plaintiffs' business, all since long prior to defendant's acts complained of herein, and plaintiffs have acquired thereby and now own good will of great value in such business and in the said use of such designations and the trade name "Stauffer System," and the name "Stauffer" in connection with the treatments of giving passive exercise, and plaintiffs have acquired and now own the sole and exclusive right to conduct said treatments in the manner originated, developed, and perfected by them as aforesaid, and plaintiffs have ac-

quired and now own the exclusive right to publicize and use the name "Stauffer System" in connection with the rendering to the public of treatments involving the giving of passive exercise and in the use of the name "Stauffer" in connection with reducing systems.

IX.

Since May 27, 1946, defendant has been rendering to the public passive exercise treatments, and wrongfully has used the name "Stauffer" and the phrases "Stauffer Tables" and "Stauffer Slenderizing Tables" in connection with the advertising and giving of said treatments, and wrongfully has copied and used a symbolic female figure similar to that used by plaintiffs to identify their business as a symbol identifying the business of defendant, and wrongfully has copied and used the copied contents of advertising brochures and other advertising of the plaintiffs and thereby is attempting to palm off and pass off upon the public, to defendant's wrongful profit and advantage, imitations of plaintiffs' "Stauffer" treatments, [6] and wrongfully is attempting to confuse the public as to the source of the services rendered by defendant, and wrongfully is seeking to appropriate and is appropriating the advertising heretofore placed and now being placed and paid for by plaintiffs and by those acting under their direction, control, and supervision, and thereby unfairly and unlawfully has secured and is securing to defendant advantages from past advertising and current advertising of plaintiffs and good will laboriously earned by plaintiffs prior to the commence-

ment of defendant's acts complained of herein, and to which said advertising advantage and good will plaintiffs exclusively are entitled and to which defendant knew that plaintiffs exclusively were entitled, all without the authority or consent of plaintiffs or either of them.

X.

Plaintiffs are informed and believe and, therefore, allege that all of the defendant's acts aforesaid, particularly defendant's use of the personal surname "Stauffer," have been conducted with the deliberate and wrongful intention by defendant of misleading the public into believing that defendant's said treatments are supervised, directed, controlled and guaranteed by plaintiffs, and with the intention and for the purpose of appropriating wrongfully to defendant the good will, favorable reputation, business, and trade name rights of plaintiffs, and with the intention and for the purpose of competing unfairly with plaintiffs, and with the intention and for the purpose of palming off and passing off upon the public, to defendant's wrongful profit and advantage, and to plaintiffs' injury, an imitation of the "Stauffer System" treatments of plaintiffs, and with the intention and for the purpose of unlawfully and unfairly securing to defendant's profit the [7] advertising advantages and good will in the personal surname "Stauffer" to which defendant knew that plaintiffs exclusively were entitled and the rendering of treatments which defendant knew that plaintiffs exclusively were en-

titled to render, and to obtain gains and profits to which plaintiffs are exclusively entitled, all with the intention and effect of damaging permanently the value to plaintiffs of their exclusive rights in and to the name "Stauffer" and in and to the name "Stauffer System."

XI.

On or about May 27, 1941, plaintiffs and one Florence Peacock entered into a written agreement, a copy of which is attached hereto and marked "Exhibit A" and made a part hereof by reference thereto. During the existence of said license agreement and with the approval of licensor said license was assigned to defendant herein. Plaintiffs have fully performed all of their obligations under said agreement, exemplified by Exhibit A, including the disclosure in trust and confidence of plaintiffs' system of treatments by the full and complete teaching and instruction by plaintiffs to defendant in the use of plaintiffs' "Stauffer System," theretofore unknown to defendant. The rights of defendant under said agreement expired on May 27th, 1946, and have not been renewed, and defendant has no further rights thereunder. By the terms of said agreement, exemplified by Exhibit A, defendant recognized and acquiesced in the exclusive ownership by plaintiffs of their rights in the "Stauffer System" and plaintiffs' exclusive right to the use of the trade name "Stauffer System," and defendant during the continuation of said agreement at all times continued to recognize and acquiesce in such exclusive ownership

by plaintiffs of their said rights, and defendant still continues to [8] recognize and acquiesce in such exclusive ownership by plaintiffs. By reason thereof, defendant is now estopped to deny plaintiffs' said exclusive ownership of their said rights.

XII.

Plaintiffs have heretofore requested and demanded that defendant discontinue and refrain from her acts complained of as aforesaid, but notwithstanding such request defendant has refused and still refuses to refrain from such acts, and plaintiffs are informed and believe and, therefore, allege that defendant intends to, and will continue to, perform such acts complained of unless enjoined and restrained from so doing.

XIII.

Plaintiffs are informed and believe, and therefore, allege that: if defendant is permitted to continue to perform her acts complained of herein as aforesaid, the public will at all times be deceived, misled, and defrauded into believing that such business wrongfully conducted by the defendant is the business of the plaintiffs, or is directed, controlled, or supervised by plaintiffs, and that the true "Stauffer System" contemplates or authorizes such treatments as provided by the defendant, all of which is, and will continue to be, to the irreparable damage, loss, and injury of the plaintiffs and the public, for which neither plaintiffs nor the public have any

plain, speedy, or adequate remedy at law to avoid or repair such damage, loss, or injury.

XIV.

That the extent of plaintiffs' damage can be ascertained only by an accounting as against the defendant. [9]

Wherefore, plaintiffs pray:

1. That the defendant and all persons acting for defendant as agents or otherwise be perpetually enjoined and restrained from the use of the "Stauffer System," and from the use of the surname "Stauffer" and trade name "Stauffer System," or any name, phrase, or device in any manner resembling or imitating, whether, by sound, appearance, or spelling the surname "Stauffer" and trade name "Stauffer System," and from the doing of the things in this complaint complained of, and from continuing and operating defendant's business in any manner tending to deceive the public or customers of the plaintiffs to the effect that plaintiffs are in any way connected with said business, and from any other act calculated to divert or secure any of the patronage or trade of plaintiffs.

2. That the plaintiffs recover from the defendant their damages for loss of patronage and in addition the profits of defendant arising from the defendant's acts complained of herein, as an accounting shall show plaintiffs entitled to, and that such accounting be had.

3. Costs of suit and for such other and further relief as the Court deems just.

FORREST MURRAY and
HARRIS, KIECH, FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed December 10, 1948.

EXHIBIT A

License Agreement

This Agreement, made and entered into on the 27 day of May, 1941, by and between B. H. Stauffer, of the City of Los Angeles, State of California, as Licensor, and Florence Peacock, as Licensee.

Witnesseth:

Whereas, the Licensor is the sole designer and manufacturer of certain tables known as "Stauffer Tables," and is the sole and exclusive originator and owner of a certain system known as the "Stauffer System"; which is a system based on the giving of passive exercise through the use of mechanical apparatus, and

Whereas, the Licensees are desirous of obtaining the rights to use the apparatus and name "Stauffer System" on the conditions hereinafter stated, limited however, to the following territory, to wit, bounded on the West by Crenshaw Blvd., on the North by Santa Barbara Ave., on the South by Florence Ave., and on the East by Main St.

All errors and conflicts in and between the lines

of the territory above described and those of adjacent Licensees shall be submitted to and fixed by Licensor.

Whereas, the Licensees recognize the ownership of the said properties and the validity of the rights in the "Stauffer System" by the Licensor; Now Therefore,

For and in consideration of the mutual benefits and promises from one to the other, and other valuable consideration. It Is Agreed:

(1) That the Licensor hereby exclusively assigns to the Licensees for a period of five (5) years commencing from the date of the execution of this Agreement, and upon [11] the conditions hereinafter set forth, the sole and exclusive license to use the apparatus and name "Stauffer System" commercially within the territory hereinbefore described. Nothing Herein, However, Shall Give the Licensees Any Interest in the Name "Stauffer System," Except the Right of Usage in the Territory Herein Described.

(2) The Licensor hereby sells and transfers to Licensees herein, Three Stauffer Tables, Numbers 194-3, 261-2 and 155-1, at Three Hundred and Fifty Dollars ($350.00) each, receipt of $250.00 being hereby acknowledged. That the Licensor agrees to deliver additional Stauffer Tables to the Licensees upon written request of the Licensees and upon payment of Three hundred and fifty dollars ($350.00) per table, to be made as early as possible from the receipt of the request and as manu-

facturing conditions will permit; and in connection therewith the Licensor will, upon request of the Licensees, instruct any operator in their employ for a reasonable period of time as to the proper methods to be used in giving the Stauffer System treatments, and Licensees agrees to give the said Stauffer System treatments according to the methods specified by the Licensor herein and not otherwise, and the failure of the Licensees to give the treatments as specified by the Licensor shall be deemed a violation of this Agreement. and the Licensor shall be the sole judge as to whether this condition is being performed and shall have the option to terminate the same by written notice addressed to the last known place of business of the Licensees. [Initialed] F. P., W. R. G., B. H. S.

(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished by the Licensor. [12]

(4) For the term of this contract, Licensor hereby assigns to Licensees the sole and exclusive license to use the name "Stauffer System" in the territory hereinbefore described. The Licensor reserves the right to sell the Stauffer Table known as Number 1 to Doctors within said territory for therapeutic purposes, or any and all Stauffer Tables to hospitals for orthopedic or therapeutic purposes only, or individuals for private use only.

(5) Licensees, at their own cost and expense, agree to do a reasonable amount of advertising for the purpose of developing the said business, said advertising shall at all times conform to Federal and State laws.

(6) Licensees agree to refrain during the terms of this agreement, from using any system or apparatus, either directly or indirectly, which is competitive or can be used unfairly, with the product or system of the Licensor. The Licensor shall be the exclusive judge, after notice and hearing, whether or not any system or apparatus used by Licensees comes within this provision.

(7) That the terms and conditions of this Agreement are deemed to be the essence thereof and time likewise is made the essence thereof.

(8) It is further agreed that neither this contract, nor any part of the territory herein described, shall be assigned, transferred or conveyed, in whole or in part, without the written consent of the Licensor.

(9) Should the holder of this License, or any business operating thereunder, for any reason whatsoever, lose possession of the Stauffer Tables and permit said tables to remain out of Licensees' possession for a period of ten (10) days, this Agreement, and all rights thereunder, automatically terminate. Should the holder of this License, or the business operating [13] thereunder, fail, become

bankrupt, or be placed in the hands of a receiver, the right to use the name "Stauffer System" automatically terminates; and it likewise automatically terminates in case of proper and lawful proceedings by, or against the said holder under any section of the Federal Bankruptcy Act, or in case said holder of License is a partnership and said partnership is dissolved.

(10) It is expressly agreed and understood that the Licensees shall never attempt to use or pledge the credit of the Licensor for any obligations, and that the Licensor shall never be liable for any of the debts, obligations or torts of the Licensees, their agents, servants and employees, and in connection therewith the Licensees agree to maintain casualty insurance in a sum not less than Five thousand dollars ($5000.00), said insurance to be in full force and effect during all the time the Licensees are in possession of the Stauffer System Tables, or are giving the Stauffer System treatments.

(11) In the event of the termination of this Agreement for any reason, the Licensees agree they will not engage in a business predicated upon the Principle of the Stauffer System, within the boundaries of the United States for a period of two (2) years after such termination.

(12) At the expiration of the original five (5) years the franchise may be extended from year to year for a period not to exceed five (5) years.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ WILLIAM R. GALLAGHER,
Witness.
/s/ B. H. STAUFFER,
Licensor.
/s/ FLORENCE PEACOCK,
Licensee.
....,
Licensee.

[Endorsed]: Filed Dec. 10, 1948. [14]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant Kathleen Exley Gallagher, sued and served herein as Kathleen Exley, and answering the complaint herein admits, denies and alleges as follows:

I.

Anwering the allegations contained in paragraphs I, IV, V, VI, VII, and VIII of said complaint this defendant has no information or belief sufficient to enable her to answer the alegations contained in said paragraphs and for want of such information and belief and basing her denial upon that ground denies generally and specifically each and every allegation contained in each and all of said paragraphs and the whole thereof.

II.

Answering the allegations contained in paragraph III of said complaint, this defendant denies generally and specifically [15] each and every allegation contained in said paragraph and the whole thereof.

III.

Answering the allegations contained in paragraph IX, defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof except as hereinafter alleged.

Further answering said paragraph, this answering defendant alleges that she is now and has been since on or about the 1st day of May, 1942, the owner of and entitled to the possession of five "Stauffer Tables"; that said "Stauffer Tables" were sold and delivered by plaintiff B. H. Stauffer to Florence Peacock and this defendant, as hereinafter alleged; that on or about the 1st day of October, 1941, this defendant acquired the interest of said Florence Peacock in and to said "Stauffer Tables" and as hereinbefore alleged this defendant is now and has since on or about the 1st day of May, 1942, been the owner of and entitled to the possession of said five "Stauffer Tables"; that this defendant as such owner of said five "Stauffer Tables" has from time to time advertised the said phrase "Stauffer Tables" and has made known to the public that she owned and possessed said five "Stauffer Tables" and that the same were available for use by the

public in connection with the operation and conduct of a reducing salon owned by this defendant and operated by her under the trade name of "Sterling Slenderizing System," all as hereinafter more particularly alleged.

IV.

Answering the allegations contained in paragraph X of said complaint, this defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof. [16]

V.

Answering the allegations contained in paragraph XI of said complaint, this defendant denies generally and specifically each and every allegation contained in said paragraph and the whole thereof.

Further answering said paragraph, this defendant admits that an agreement was entered into with plaintiff B. H. Stauffer in the form attached to the complaint marked Exhibit A and that said agreement expired by its terms on May 27, 1946, and has not been renewed. This defendant further alleges that the interest of Florence Peacock in said agreement and in and to the "Stauffer Tables" referred to therein, was assigned and transferred to this defendant with the knowledge, consent, and permission of said B. H. Stauffer on or about the 1st day of October, 1941, and that this defendant thereby succeeded all of the rights of said Florence Peacock in and to said agreement and said "Stauffer Tables."

VI.

Answering the allegations contained in paragraphs XII, XIII, and XIV, this defendant denies generally and specifically each and every allegation contained in said paragraphs and the whole thereof.

VII.

Further answering said complaint this defendant alleges that at the time of the execution of said agreement attached to the complaint marked Exhibit "A," the said B. H. Stauffer sold and delivered to said Florence Peacock three "Stauffer Tables" referred to and described in said agreement, for the sum of $350.00 each; thereafter said Florence Peacock purchased an additional "Stauffer Table" from said plaintiff B. H. Stauffer; that this defendant with the knowledge, consent, and permission of said plaintiff B. H. Stauffer acquired the interest of said [17] Florence Peacock in and to said four "Stauffer Tables" and ever since the 1st day of October, 1941, has been and is now the owner of said four "Stauffer Tables"; that on or about the 1st day of May, 1942, said plaintiff B. H. Staffer sold and delivered to this defendant an additional "Stauffer Table"; that as hereinbefore alleged this defendant now owns and possesses, and ever since said 1st day of May, 1942, has owned and possessed a total of five "Stauffer Tables."

VIII.

That said five "Stauffer Tables" were purchased from plaintiff B. H. Stauffer under five separate

contracts of conditional sale, in each of which said contracts the said "Stauffer Tables" were referred to in the following manner:

"Conditional Sale Contract

"The undersigned Seller hereby sells and the undersigned Purchaser hereby purchases subject to the terms and conditions hereinafter set forth, the following described property, to-wit:

"Item: 3.

Quantity: 1.

Make: Stauffer.

Description of Equipment: Table.

Model: 3.

Serial Number: 194-3.

Cabinet or Motor Number:

for the following payments in lawful money of the United States of America":

That each of said five contracts of conditional sale were signed by plaintiff B. H. Stauffer as seller and were identical, with the exception of the model and serial number of [18] the tables and the dates and amounts of payments.

IX.

That several months prior to the expiration of the said agreement attached to the said complaint marked Exhibit "A," and on or about the 1st day of February, 1946, this defendant ceased to advertise or represent herself to the public as "Stauffer System" and commenced to advertise her business as "Sterling Slenderizing System." That this

defendant was formerly known as and her legal name was Kathleen Sterling.

That this defendant operates and conducts a reducing salon in the area and section of the City of Los Angeles known as Leimert Park under the name of "Sterling Slenderizing System," and in connection therewith uses various types of tables and equipment, including a "Tammen Table," "Multiple Oscillation" equipment, and "Stauffer Tables"; that this defendant utilizes and displays on the building in which she conducts her salon a large sign approximately twelve feet long with large eight-inch lettering painted red containing the words "Sterling System"; that this defendant also displays in connection with her said business the following additional signs: a smaller sign containing the words "Stauffer & Tammen Tables"; a sign at right angles to the store front have two surfaces containing the words "Sterling Slenderizing"; another sign at right angles to the store front containing the words "Stauffer & Tammen Tables"; another sign at right angles to the store front containing the words "Sterling Slenderizing System"; and another sign on the window of the store containing the words "Sterling Slenderizing System."

X.

That all of this defendant's advertising emphasizes and stresses in large type the name "Sterling Slenderizing System"; that in such advertising the words "Stauffer Tables" [19] and "Tam-

men Table" and "Multiple Oscillation" are used in a subordinate and inconspicuous manner and in such a way as to feature, stress, and place emphasis on this defendant's trade name of "Sterling Slenderizing System"; that several months prior to the expiration of said agreement marked Exhibit "A" and commencing on or about the 1st day of February, 1946, and continuing up to the present time, this defendant has not advertised "Stauffer System" nor has she represented or held herself out to the public by advertising or otherwise as "Stauffer System."

XI.

That the salons operated under license from the plaintiffs display a unique and distinctive sign in script lettering containing the words "Authorized Stauffer System." That said sign is common to all of said salons licensed by the plaintiffs and is readily recognized and identified by the public generally as being a salon utilizing "Stauffer System"; that the said salon operators, licensed by plaintiffs do not perform or render any services other than "Stauffer System" and do not use any tables or equipment other than those manufactured, furnished, or provided by plaintiffs.

XII.

That this defendant, as heretofore alleged, displays a total of seven signs in connection with the conduct of her salon; that in addition to a reducing system, this defendant's salon also contains

a beauty parlor, a department for electrolysis and a special department for facials; that by reason of the size, number, and nature of the signs displayed by this defendant and the great difference between said signs and the said unique and distinctive sign displayed by the salons licensed by plaintiffs and by further reason of emphasizing by this defendant of the name "Sterling Slenderizing System" in her advertising, as aforesaid, there is no opportunity or likelihood of the general [20] public mistaking or confusing the salon of this defendant and the services furnished by her for a salon licensed by plaintiffs; that this defendant has taken every reasonable precaution to prevent the public from being misled or deceived into mistaking or confusing her salon and the said services furnished by her as being a salon licensed by plaintiffs using "Stauffer System."

XIII.

That during the time the said agreement attached to the complaint marked Exhibit "A" was in effect, this answering defendant developed a substantial good will in the reducing and slenderizing business in the said area and section of the city of Los Angeles known as Leimert Park; that the patronage which this defendant enjoys is due to her own industry, personal efforts and reputation in the said community known as Leimert Park.

That several months prior to the expiration of the said agreement marked Exhibit "A," plaintiff B. H. Stauffer submitted to this defendant a

proposed further agreement wherein the said plaintiff B. H. Stauffer offered to assign to this defendant the exclusive right to use the name "Stauffer System" in said Leimert Park area for a period of five years commencing May 27, 1946. That said proposed agreement differed from the said agreement attached to the complaint marked Exhibt "A" in that in said proposed agreement, the "Stauffer Tables" therein referred to, were to be leased and rented to this defendant rather than sold and delivered outright as provided in said Exhibit "A"; that said proposed agreement further provided for the payment of a rental of $7.50 a month for each "Stauffer Table" used in the said territory covered by said agreement; that at the time said plaintiff B. H. Stauffer submitted said proposed agreement to this defendant, he requested and demanded that this defendant pay to him a rental of $7.50 for each of the said [21] five "Stauffer Tables" theretofore purchased, acquired, and owned by her. That this defendant declined to pay said rental on the said five tables belonging to her and the said proposed agreement was never entered into; that this defendant continued to operate a reducing salon in the said Leimert Park area under the trade name of "Sterling Slenderizing System" as aforesaid.

XIV.

That the advertisement of "Stauffer Tables" in connection with the operation of a reducing salon by this defendant under the trade name of "Sterling Slenderizing System" is a truthful and honest state-

ment of the origin of said "Stauffer Tables"; that in so advertising said tables in an inconspicuous and subordinate manner in connection with the conduct of her said "Sterling Slenderizing System" this defendant honestly and truthfully represented and does represent to the public that she owned and possessed and was and is entitled to use an article or articles which she had theretofore bought and paid for, namely, the said five "Stauffer Tables."

For a Further, Separate, and First Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That said plaintiffs, as appears from the allegations contained in the complaint, are engaged in interstate commerce, transacting business in California and elsewhere throughout the United States; that the said agreement attached to the complaint marked Exhibit "A" contains, in part, the following:

"(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished [22] by the Licensor."

This defendant is informed and believes and therefore alleges that similar clauses are contained in all of the licenses and franchises granted by plaintiffs to licensees doing business in this State and elsewhere throughout the United States. That said

clause provides for price maintenance and is illegal and void and contrary to the Sherman Act (1890 15 USCA, section 1), and the Clayton Act (15 USCA, section 14). That said agreement attached to the complaint marked Exhibit "A" and each and every license and franchise issued by plaintiffs containing a price maintenance clause is in restraint of trade and contrary to said statutes above referred to.

For a Further, Separate, and Second Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That the said agreement attached to the complaint marked Exhibit "A" contains, in part, the following:

"(3) The Licensor will furnish the Licensees with a written schedule of prices to be charged customers for the Stauffer System treatments, and the Licensees agree to maintain the said written schedule as furnished by the Licensor."

This defendant is informed and believes and therefore alleges that similar clauses are contained in all of the licenses and franchises granted by plaintiffs to licensees doing business in this State. That said clause provides for price maintenance and is illegal and void and contrary to the Cartwright Act (Stats. 1907 p. 984, as amended by Stats. 1909, p. 593; Deering's Gen. Laws, 1931, Act 8702). That said agreement attached to the complaint marked Exhibit "A" and each and every license and [23]

franchise issued by plaintiffs in this State containing a price maintenance clause is in restraint of trade and contrary to said Cartwright Act above referred to.

For a Further, Separate, and Third Affirmative Defense to the cause of action set forth in the complaint, this defendant alleges as follows:

I.

That the Court lacks jurisdiction of the subject matter of the within action.

Wherefore, this answering defendant prays that the action be dismissed and that plaintiffs have no relief whatsoever, and that this defendant have her costs incurred herein, and for such other and further relief as seems meet and just in the premises.

Dated this 7th day of January, 1949.

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
and
FRANK W. DOHERTY.
By /s/ WILLIAM R. GALLAGHER.

State of California,
County of Los Angeles—ss.

Kathleen Exley Gallagher, sued and served herein as Kathleen Exley, being by me first duly sworn, deposes and says: that she is the defendant in the above-entitled matter; that she has read the foregoing Answer and knows the contents thereof; and that the same is true of her own knowledge, except

as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

/s/ KATHLEEN EXLEY GALLAGHER.

Subscribed and sworn to before me this 6th day of January, 1949.

[Seal] /s/ FRANK W. DOHERTY,
Notary Public in and for Said County and State.
My Commission Expires June 13, 1952.

Received copy of the within Answer this 7th day of January, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
/s/ JACK BARRY, JR.
Attorneys for Plaintiff.

[Endorsed]: Filed January 10, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff, Stauffer System, Inc., is a corporation of the State of California and is a citizen and inhabitant of said state and Plaintiff B. H. Stauffer is a citizen and inhabitant of said state.

2. Plaintiffs, Stauffer System, Inc., and B. H. Stauffer do business in the State of California and

in other states of the United States and are engaged in interstate commerce and in commerce within the meaning of the Trade-Mark Act of July 5, 1946, C. 540, United States Code Annotated, Title 15, Sections 1051 to 1127, inclusive.

3. Plaintiff B. H. Stauffer owns and plaintiff Stauffer System, Inc. uses the trade-mark "Stauffer System" in commerce.

4. The trade-mark "Stauffer System" owned by Plaintiff B. H. Stauffer and used in commerce by Plaintiff Stauffer System, Inc. has not been registered in the United States Patent Office. [27]

5. Defendant Kathleen Exley is a citizen and inhabitant of the State of California.

6. The action herein is a simple action for unfair competition.

7. There is joined to the action for unfair competition no substantial and related claim under the copyright, patent or trade-mark laws.

8. There has been a separate trial of the issue of jurisdiction herein.

Conclusions of Law

1. There is no diversity of citizenship between and among plaintiffs and defendant.

2. The Trade-Mark Act of July 5, 1946 does not confer original jurisdiction upon the district courts of the United States in actions for unfair competition in the absence of diversity of citizenship of the parties where there is no substantial and related claim under the copyright, patent or trade-mark laws joined to such actions.

3. This court does not have jurisdiction of the action herein because of the lack of diversity of citizenship of the parties and because there is no substantial and related claim under the copyright, patent or trade-mark laws joined to said action.

Dated: At Los Angeles, California, this 11th day of April, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

Approved As To Form, this 5th day of April, 1949.

FRANK P. DOHERTY,
WILLIAM R. GALLAGHER,
FRANK W. DOHERTY,
By /s/ WILLIAM R. GALLAGHER,
Attorneys for Defendant.

Received copy of the within Findings of Fact, etc., this 31st day of March, 1949.

WILLIAM R. GALLAGHER,
Attorney for Defendant.

[Endorsed]: Filed April 11, 1949.

United States District Court, Southern District of California, Central Division

No. 8977-Y Civil

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Plaintiffs,

vs.

KATHLEEN EXLEY,

Defendant.

JUDGMENT

In accordance with, and for the reasons set forth in the Findings of Fact and Conclusions of Law signed and filed herewith in the above-entitled cause,

It Is Ordered, Adjudged and Decreed that the above-entitled cause is hereby dismissed for lack of jurisdiction.

Dated: April 11, 1949.

/s/ LEON R. YANKWICH,
Judge.

Judgment entered April 12, 1949.

Docketed April 12, 1949.

[Endorsed]: Filed April 11, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that B. H. Stauffer and Stauffer System, Inc., plaintiffs above named, appeal to the Court of Appeals for the Ninth Circuit

from Interlocutory Judgment entered in this action on April 12, 1949.

Dated: At Los Angeles, California, this 29th day of April, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,
/s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed April 29, 1949.

[Title of District Court and Cause.]

STIPULATION RE COST BOND ON APPEALS

Whereas, plaintiffs in the above-entitled action on April 29, 1949, filed a Notice of Appeal therein,

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, that plaintiffs need file no cost bond under Rule 73(c) of the Rules of Civil Procedure in said appeal. This stipulation may, but need not be filed.

Dated this 10th day of May, 1949.

FRANK P. DOHERTY &
WILLIAM R. GALLAGHER,
/s/ FRANK W. DOHERTY,
Attorneys for Defendant.
HARRIS, KIECH,
FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 10, 1949.

[Title of District Court and Cause.]

CONCISE STATEMENT OF POINTS OF APPEAL UNDER RULE 75(a)

The Trial Court erred in holding:

1. That the Trade-Mark Act of July 5, 1946, does not confer upon the District Courts of the United States original jurisdiction in actions for unfair competition where there is no substantial and related claim under the copyright, patent or trade-mark laws joined to such an action.

2. That the Trade-Mark Act of July 5, 1946, does not confer upon the District Courts of the United States original jurisdiction in actions for unfair competition irrespective of the fact that the parties are inhabitants of the same state.

HARRIS, KIECH,
FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs-Appellants.

Dated: May 10, 1949.

[Endorsed]: Filed May 10, 1949.

PLAINTIFFS'-APPELLANTS' DESIGNATION OF PORTION OF RECORD ON APPEAL PURSUANT TO RULE 75(a)

The Clerk of this Court, in conformance with Rule 75 of Federal Rules of Civil Procedure, is

requested to transmit to the Clerk of the Court of Appeals for the Ninth Circuit, the following designated portions of the record:

1. The Complaint for unfair competition filed December 10, 1948.
2. Answer to Complaint filed January 10, 1949.
3. Findings of Fact and Conclusions of Law filed April 11, 1949.
4. Judgment entered April 12, 1949.
5. Notice of Appeal filed April 29, 1949.
6. Stipulation that no bond for costs be filed.
7. Concise Statement of Points on Appeal under Rule 75(a).
8. This Designation.

Dated this 10th day of May, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
By /s/ FORD HARRIS, JR.,
Attorneys for Plaintiffs-Appellants.

Received copy this 10th day of May, 1949.
FRANK P. DOHERTY.

[Endorsed]: Fied May 10, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 35, inclusive, contain the original Complaint for Unfair Competition; Answer; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Stipulation re Cost Bond on Appeal; Statement of Points on Appeal and Designation of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 3rd day of June, A.D. 1949.

EDMUND L. SMITH,
Clerk,
[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12258 United States Court of Appeals for the Ninth Circuit. B. H. Stauffer and Stauffer System, Inc., Appellants. vs. Kathleen Exley, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 6, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12258

B. H. STAUFFER and STAUFFER SYSTEM, INC.,

Appellants,

vs.

KATHLEEN EXLEY,

Appellee.

DESIGNATION OF APPELLANTS

Appellants hereby adopt the Plaintiffs'-Appellants' Designation of Portions of Record on Appeal, filed in the District Court, and already a part of the record on appeal herein, as their designation on appeal of the record to be printed.

Dated: At Los Angeles, California, this 7th day of July, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,
By /s/ FORD HARRIS, JR.,
Attorneys for Appellants.

Received copy of the within Designation of Appellants, this 8th day of July, 1949.

By /s/ WILLIAM R. GALLAGHER,
Attorneys for Appellee.

[Endorsed]: Filed July 11, 1949.

[Title of Court of Appeals and Cause.]

NOTICE OF ADOPTION OF STATEMENTS OF POINTS

Appellants hereby adopt as their statement of points under Rule 19(6) on their appeal the Concise Statement of Points on Appeal under Rule 75(a) appearing in the transcript of the record certified by the Clerk of the District Court and filed herein.

Dated: At Los Angeles, California, this 7th day of July, 1949.

HARRIS, KIECH,
FOSTER & HARRIS,
FORD HARRIS, JR.,
JACK BARRY, JR.,
By /s/ FORD HARRIS, JR.,
Attorneys for Appellants.

Received copy of the within Notice of Adoption of Statement of Points, this 8th day of July, 1949.

By /s/ WILLIAM R. GALLAGHER,
Attorneys for Appellee.

[Endorsed]: Filed July 11, 1949.